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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 973

GERHARD BRASCH,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

HALLINAN, SHAPIRO AND HALLINAN, Attorneys at Law,
VINCENT HALLINAN, Attorney at Law,
CARL B. SHAPIRO, Attorney at Law,
PATRICK SARSFIELD HALLINAN, Attorney at Law,
BRIAN D. ROHAN, Attorney at Law,
Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

GERHARD BRASCH,
3035 Gough Street, Apt. 8,
San Francisco, California 94123,
Petitioner in propria persona.

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Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of the State of California entered in the above case on November 16, 1966.

OPINIONS BELOW

The Superior Court, the District Court of Appeal and the Supreme Court of the State of California delivered no opinions.

JURISDICTION

The order of the Supreme Court of the State of California "Petition for hearing DENIED", without opinion, was made and entered on November 16, 1966 and a copy thereof is appended to this petition in the Appendix at page i. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The respondent court told petitioner in propria persona at the beginning of the first hearing of his complaint for damages for legal malpractice that he could not find an attorney because he had no cause, over-ruled at the next hearing the demurrer of the real parties in interest with time given them to answer, then granted them a further extension of time to answer, and denied, of its own motion, petitioner's requests to enter their default according to law, when they had failed twice to answer within the times allowed, holding, they had filed one day late.

Petitioner claimed in his motion to set aside the denial of his request for entry of default and to enter the default of the real parties in interest that the respondent court denied his right of due process of law by holding that petitioner could not find an attorney because he had no cause and his right of the equal protection of the laws by refusing to enter the default of the real parties in interest, based upon its discriminatory hostility against petitioner because he was not represented by an attorney and its favoritism

for the real parties in interest, both rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The respondent court denied petitioner's motion, ruling that the Fourteenth Amendment does not apply to petitioner's case.

The District Court of Appeal denied without opinion petitioner's petition for a writ of mandate in which he had claimed denial of his Constitutional rights of due process of law and of the equal protection of the laws by the court below, as explained above.

The Supreme Court of the State of California denied without opinion petitioner's petition for a hearing, in which he had claimed denial of his Constitutional rights of due process of law and of the equal protection of the laws by the respondent court as explained above.

The questions presented are:

1. Whether the respondent court denied petitioner his Constitutional right of due process of law guaranteed by the Fourteenth Amendment by ruling at the very beginning of the first hearing of petitioner's complaint for damages for legal malpractice upon petitioner's pleading to protect his legal rights because he is a layman who could not find an attorney willing to take his case that petitioner could not find an attorney because he had no cause.

2. Whether the respondent court denied petitioner his Constitutional right of the equal protection of the laws guaranteed by the Fourteenth Amendment by denying, of its own motion and contrary to the manda-

tory provisions of sections 586(2) and 585(1)(2) of the California Code of Civil Procedure requiring entry of default, petitioner's two unopposed requests for entry of the default of the real parties in interest, based upon its discriminatory hostility against petitioner because he was not represented by an attorney and its favoritism for the real parties in interest.

FEDERAL CONSTITUTIONAL PROVISIONS AND STATE CODES INVOLVED

The pertinent portions of the Fourteenth Amendment to the Constitution of the United States and of sections 473, 586, 585 and 1054 of the California Code of Civil Procedure are set forth in the Appendix at pages ii-vi.

STATEMENT

Petitioner in propria persona, a layman, filed on March 4, 1966 a complaint for damages for legal malpractice in the amount of $108,206.58 including costs plus interest at the legal rate beginning January 17, 1966 in the respondent court, Proceedings No. 564547, against the real parties in interest named in the caption for the following reasons.

The real parties in interest had accepted petitioner's original action, filed by him in propria persona in the Municipal Court of the City and County of San Francisco, California, after one of the defendants in that action had filed a demurrer. Petitioner gave them his

litigation papers and written information and paid the requested fee in advance for amending his complaint. They did not amend it, and they did not transfer his complaint to the Superior Court, as he had instructed them, since he had discovered in the meantime that he was entitled to damages in excess of $5,000.00. On November 20, 1964 a Judgment of Dismissal with Prejudice was entered against petitioner upon ex parte motion of one of the defendants. Petitioner, again in propria persona, claimed in his appeal from this Judgment damages in the amount of $107,406.89. His appeal and petitions for review of this Judgment were denied; the last of his motions on January 17, 1966. The real parties in interest returned to petitioner his papers and their fee after the entry of the Judgment of Dismissal with Prejudice.

The real parties in interest demurred that petitioner had filed his action too late. On March 17, 1966 the Presiding Judge of the Superior Court granted petitioner an extension of time up to and including April 13, 1966 for answering the demurrer and ordered that the demurrer should be heard on a day following April 13, 1966. On April 8, 1966 petitioner filed his answering brief.

On April 13, 1966 petitioner discovered that the respondent court had scheduled a hearing on the demurrer for the same day. He appeared and immediately at the very beginning of the hearing asked the respondent court to protect his legal rights since he is a layman who could not find an attorney willing to take his case. The respondent court told him that all

people are equal before the law, that the court could not write the pleadings of a party, and that he could not find an attorney because he had no cause. The hearing on the demurrer was continued to July 8, 1966 in order to wait for the decision in a pending action before the California State Supreme Court whether the statute of limitations applying to legal malpractice is one year or two years. There is no transcript of the hearing on the demurrer.

Petitioner wrote in his Amendment to Plaintiff's Answering Brief of May 12, 1966 that the California State Supreme Court held that the statute of limitations governing damage actions for legal malpractice is two years and that he had filed his complaint timely.

On May 23, 1966 petitioner mentioned in his brief entitled "Objections and Taking Exceptions" that he had received no notice that a hearing of his case had been scheduled for April 13, 1966, and he specifically claimed denial of his Constitutional right of due process of law guaranteed by the Fourteenth Amendment by the respondent court as follows:

> "In the beginning of the hearing the Court told plaintiff that he could not find an attorney willing to take his case because he had no cause. Plaintiff pleads that this statement made by the Court in the beginning of the hearing is prejudicial to his cause in that it is a determination of the merits of his cause based upon an extraneous matter, namely, the fact that he could not find an attorney willing to take his case and not upon his pleading that he has a good cause for the following reasons: . . .

> Plaintiff pleads that the above statement by the Court made in the beginning of the hearing deprives him of his right to due process of law guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that no State 'shall deprive any person of life, liberty, or property, without due process of law'."

He pleaded furthermore that the remark by the respondent court to counsel for the real parties at the close of this hearing that he did not have to give to petitioner a copy of the expected decision by the California State Supreme Court and that he could get his own copy appeared to be unnecessary and hostile. (Record, Superior Court, Objections and Taking Exceptions, page 1, lines 18-28, line 29 to page 2, line 4, lines 17-30.)

On July 8, 1966 the respondent court overruled the demurrer of the real parties in interest with twenty days given to them to answer. The respondent court did not rule on petitioner's claimed denial of his Constitutional right of due process of law. There is no transcript of this hearing.

The real parties in interest did not answer. On August 1, 1966 petitioner requested entry of default. On August 2, 1966 the respondent court granted them additional time up to and including August 8, 1966 to answer. They filed their answer on August 9, 1966. On August 15, 1966 petitioner filed a second request for entry of default.

At the hearing on petitioner's request for entry of default on August 16, 1966 the respondent court ordered: No Default Entered. The real parties in interest did not appear at this hearing.

In his Motion to set Aside Denial of Plaintiff's Request for Entry of Default and to Enter Default of September 2, 1966 petitioner claimed denial of his Constitutional rights guaranteed by the Fourteenth Amendment

> "upon the grounds that the Court in denying plaintiff's request acted without authority and that this denial deprives him of his rights of due process of law and of the equal protection of the laws guaranteed by the provisions of the Fourteenth Amendment to the Constitution of the United States that 'nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'." (Record, Superior Court, Motion to Set Aside Denial of Plaintiff's Request for Entry of Default and to Enter Default, page 1, lines 21-29.)

Petitioner pleaded that the refusal of the respondent court to enter the default of the real parties in interest was not in accord with the following decisions of the California State Supreme Court:

> " 'Where a demurrer to the complaint has been overruled and the defendant fails to answer within the time granted him, the clerk is authorized to enter his default and judgment for the amount specified in the summons.' Bailey v. Sloan, 65 Cal. 387.

'Where a demurrer has been overruled and time given to answer, but no answer is filed within the time granted by the court to the defendant in which to answer, the clerk is authorized to enter a default judgment without an order of the court.' Wall v. Heald, 95 Cal. 364." (Record, ibid. page 2, lines 16-24.)

"In the hearing on August 16, 1966 on plaintiff's request for entry of default, the Court, denying plaintiff's request, explained that defendants had been one day late in answering and the Court would not strike their answer on that ground; if the Court should enter default, the defendants would ask the Court to set it aside on the grounds of excusable neglect or inadvertence; any court would relieve them of their one day being late because they might plead that their answer was inadvertently filed one day late. However, the defendants had filed no motion in opposition to plaintiff's request for entry of default; they did not appear at the hearing. But, when plaintiff inquired of the Court what motion he should file now, the Court told him that it is improper for the Court to advise him how to try his suit and that a layman would get no greater courtesy than a person represented by an attorney.

'While the court has power to relieve a party from default suffered through inadvertence, surprise, excusable neglect of mistake, these words are not meaningless, and the party requesting such relief must affirmatively show that the situation clearly falls within such category.' Estate of Wolper, 146 C.A. 2d 249.

Plaintiff pleads that the Court had no authority to deny plaintiff's request for entry of default because the defendants had not asked for such relief that the Court by denying plaintiff's request acted arbitrarily in favor of defendants and against the rightful interests of plaintiff and thus deprived plaintiff of his right of due process of law guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall 'deprive any person of life, liberty, or property without due process of law.'" (Record, ibid., page 2, line 30 to page 3, line 26.)

"In the hearing on August 16, 1966 the Court told plaintiff that a layman gets no greater courtesy than a person represented by an attorney and that it would be improper for the Court to advise plaintiff how to try his lawsuit. But, as plaintiff explained, . . . above, the Court advanced a number of reasons in favor of the defendants in order to have sufficient grounds for denying plaintiff's request for entry of default even though the defendants, four attorneys, had filed no brief in opposition to plaintiff's request for entry of default and had not appeared at the hearing. Plaintiff pleads that these acts show a strong hostility of the Court toward plaintiff because he is a layman who had to appear in propria persona in Court since he could not find an attorney willing to take his case.

But plaintiff's rights, as affected by the denial of his request for entry of default, are no less because he is a layman who could not find an attorney willing to take his case. The Fourteenth Amendment to the Constitution of the United

States provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws'. This provision is universal in its application 'to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality'. (Yick Wo v. Hopkins, 118 U.S. 356, 369.)

Plaintiff pleads that the denial of his request for entry of default amounts to the practical denial by the Court of that equal protection of the laws which is secured to plaintiff in propria persona as to all other plaintiffs represented by attorneys having business before the Court by the above cited provision of the Fourteenth Amendment to the Constitution of the United States.

Plaintiff prays that the Court upon the grounds set forth above set aside and vacate its order of August 16, 1966 denying plaintiff's request for entry of default and enter the default of the defendants. . . ." (Record, ibid., page 4, line 9 to page 5, line 9.)

At the hearing on September 29, 1966 counsel for the real parties in interest did not oppose petitioner's motion to set aside the denial of petitioner's request for entry of default and to enter default. Petitioner claimed denial of his rights of due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States by the respondent court. He claimed that the defendants had not opposed his motion for entry of default and had not appeared at the hearing on his request for entry of default. The respondent

court denied petitioner's motion and passed upon the federal question as follows:

> "And may I make a statement to you, that when you quote the 14th Amendment do not quote it for something that—where it is not applicable.
>
> It is a precious Amendment; equal protection of the law is precious to all loyal Americans, to all of us, don't quote it needlessly. It is sometimes like taking the name of the Lord in vain. I really mean it.
>
> It has nothing to do with the issues of this case. . . . but it shouldn't be used in this situation.
>
> You have filed your papers. I know your contentions. You have not caused the Court to change its decision. And my order therefore must be that your motion to set aside denial of plaintiff's request for entry of default and to enter default is denied." (Record, Superior Court transcript of hearing on September 29, 1966; page 3, lines 8-10; 14-17; 19-20; 22-23; page 4, lines 22-26.)

In his petition for a writ of mandate filed on October 17, 1966 with the District Court of Appeal, First District petitioner prayed that the court may vacate the order of the court below denying his request for entry of default and direct the court to enter the default of the real parties in interest. He pleaded the facts stated above, emphasizing that the respondent court acted without jurisdiction and abused its discretion by denying, of its own motion and without any showing by the real parties in interest of mistake, inadvertence or any other reasons his motion to set aside its order denying entry of default and to enter

default. (Record, District Court of Appeal, petition, page 8, lines 17-24.)

Petitioner claimed denial of his Constitutional right of due process of law by the respondent court as follows:

> "Petitioner pleads that the statement by the court below at the very beginning of the hearing on April 13, 1966 and before submission of arguments that petitioner could not find an attorney because he had no cause is a denial of his right of due process of law guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that 'nor shall any State deprive any person of life, liberty, or property, without due process of law' for the following reasons: It is a judicial fiat, taking the place of fact; a creation of a presumption disregarding entirely his pleading that he has a good cause; the connection between the fact proven that he could not find an attorney willing to take his case and that presumed that he has no cause is not sufficient, and reasoning does not lead from one to the other; it is a taking of petitioner's property, his claim against the real parties in interest for legal malpractice in the amount of $108,206.58 and giving it to them without compensation and hearing, that is without due process of law.
>
> Petitioner pleads that the two denials of his requests for entry of default of the real parties in interest of the own motion of the court are not in accord with the decisions of higher courts of the State and are based upon the open hostility of the court against petitioner because he did not employ an attorney, in disregard of his pleading

that he could not find an attorney who would take his case and are thus a denial of his right of the equal protection of the laws guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' as explained . . . , above.

The real parties in interest did not appear at the hearing on petitioner's request for entry of default on August 16, 1966. The court, by setting forth of its own motion a number of erroneous reasons in favor of the real parties in interest and thus acting as their counsel and against petitioner, denied petitioner's motion for entry of default. But when petitioner asked, 'If I may ask you, your Honor, I am a layman', the court told him, 'You are a layman. I wish to tell you that a layman gets no greater courtesy than a person represented by a lawyer, otherwise people will say, "Why should I have a lawyer?"' " (Transcript, hearing, August 16, 1966, page 3, lines 13-18.)

"The hostility of the Court against petitioner and its endeavors to protect the real parties in interest and to deny his rightful claims are again evident by the holding of the Court in the hearing on September 29, 1966 that 'the law gives the Court the right under a proper showing to set aside--' . . . '--a default--' . . . '--or set aside the denial of plaintiff's request for entry of default, which is the same thing.' Petitioner immediately claimed that the law requires an affirmative showing by the defendants of inadvertence or other reasons (to permit the court to set aside their

default) that they had made no showing and had not even appeared at the prior hearing on petitioner's request for entry of default. (Transcript of hearing on September 29, 1966, page 2, lines 13-26.)—In fact, the defendants did not have to oppose petitioner's motion for entry of default, since the court acted as their counsel, denying petitioner's motion for entry of default and advising him that it is improper for the court to answer his questions. (Transcript of hearing on August 16, 1966, page 3, line 19 to page 4, line 11.)" (Record, District Court of Appeal, petition, page 8, line 25 to page 11, line 4.)

On October 20, 1966 the District Court of Appeal denied petitioner's petition for a writ of mandate without opinion.

On October 31, 1966 petitioner filed a petition for a hearing with the Supreme Court of the State of California in which he pleaded the proceedings in the courts below and claimed that

> "the respondent court, by denying, of its own motion, petitioner's request for entry of default acted contrary to the mandatory provisions of sections 586(2) and 585(1)(2) of the Code of Civil Procedure which require entry of default on petitioner's request and that this decision by the respondent court is not in accord with the holdings of this Court in *Bailey v. Sloan*, 65 Cal. 387 and *Wall v. Heald*, 95 Cal. 364." (Record, Supreme Court, petition for hearing, page 11, lines 3-9.)

Petitioner pleaded that the real parties in interest had not appeared at the hearing on August 16, 1966

on his request for entry of default and had not opposed it. The respondent court, refusing to enter their default, said,

> "I will not do it because if I did I would set it aside. They dated it the 8th—no, counsel, you would be wasting your time. If I entered the default they would come right back and move to set it aside on the grounds of excusable neglect, or inadvertence or neglect. It wouldn't accomplish you anything. We don't do things like that, one day late." (Record, transcript of hearing, August 16, 1966, page 3, lines 5-11.)

Petitioner pleaded that the respondent court by relieving the real parties in interest, of its own motion, of their default acted contrary to the mandatory provisions of section 473 of the Code of Civil Procedure and without jurisdiction, abused its discretion, and that the Court's action is not in accord with the holdings of the California State Supreme Court cited in *Reminders, Inc. v. Superior Court,* 192 C.A. 2d 411, 412-413. (Record, ibid., page 11, line 11 to page 12, line 8.)

Petitioner pleaded that the respondent court told him at the very beginning of the first hearing of his action on April 13, 1966 and before submission of arguments in a rough, unfriendly manner that he could not find an attorney because he had no cause, thus making him feel like an intruder. He pleaded

> "that this statement by the respondent court is the creation of a presumption disregarding entirely his pleading that he has a good cause; it is a judicial fiat taking the place of fact; the

connection between the fact proved that he could not find an attorney willing to take his case and that presumed that he has no cause is not sufficient, and reasoning does not lead from one to the other. *Manley v. Georgia,* 279 U.S. 1, 6, 7. The statement is a taking of petitioner's property, his claim for legal malpractice against the real parties in interest in the amount of $108,206.58 and giving it to them without compensation and hearing, that is without due process. *Chicago, Burlington & Quincy Railroad Company v. City of Chicago,* 166 U.S. 226, 235, 237, 240." (Record, ibid., page 12, line 10 to page 13, line 5.)

Petitioner claimed denial of his Constitutional right of due process of law as follows:

"For these reasons petitioner pleads that this finding by the respondent court that he could not find an attorney willing to take his case because he had no cause is a denial of his right of due process of law guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that 'nor shall any State deprive any person of life, liberty, or property, without due process of law'. *Brinkerhoff-Faris v. Hill,* 281 U.S. 673." (Record, ibid., page 13, lines 6-13.)

Petitioner pleaded that the respondent court told him at the very beginning of the first hearing of his complaint on April 13, 1966 that he could not find an attorney because he had no cause and advised opposing counsel that he did not have to give him a copy of the expected decision by the California State Supreme Court and that he could get his own copy, thus showing openly his hostility against him; and furthermore,

that all people are equal before the law, that the court could not write the pleadings of a party, that all people have to write their own pleadings, and that a layman does not receive any more consideration by the court than a person represented by an attorney. However, the respondent court at the hearing on August 16, 1966 after having denied, of its own motion, petitioner's unopposed request for entry of default of the real parties in interest, told him upon his respectful enquiry whether he may submit a question,

> "You are a layman. I wish to tell you that a layman gets no greater courtesy than a person represented by a lawyer, otherwise people will say, 'Why should I have a lawyer?'" (Transcript of hearing on August 16, 1966, page 3, lines 13-18.) "There is nothing that I can tell you. If you want to find out how you get a case set for trial, you will have to go elsewhere, I cannot do that for you, otherwise I would be acting as your advisor." (Ibid., page 4, lines 8-11.) (Record, Supreme Court, petition, page 13, line 15 to page 15, line 6.)

Petitioner claimed denial of his Constitutional right of the equal protection of the laws as follows:

> "Petitioner pleads that the reasons for this unjust and illegal discrimination by the respondent court against petitioner, a party in litigation before a court and material to his rights, and in favor of the real parties in interest are the strong hostility and resentment of the respondent court against petitioner because he did not provide gainful employment to a lawyer even though he had explained to the respondent court that he

could not find an attorney who would take his malpractice action. He pleads that such hostile discrimination in the eye of the law is not justified and illegal and amounts to the practical denial of his right of the equal protection of the laws guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall 'deny to any person, within its jurisdiction, the equal protection of the laws'. *Yick Wo v. Hopkins, Sheriff,* 118 U.S. 356, 369-370, 373-374. *Virginia v. Rives,* 100 U.S. 313, 318. *Truax v. Corrigan,* 257 U.S. 312, 332-333." (Record, Supreme Court, petition, page 15, lines 7-23.)

On November 16, 1966 the California State Supreme Court denied his petition for a hearing without opinion.

REASONS FOR GRANTING THE WRIT

The decree by the Supreme Court of the State of California should be reviewed because it denies, summarily, without opinion, petitioner's claimed rights of due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, it is not in accord with applicable decisions of this Court, and petitioner's averments, properly taken below, present substantial Federal questions.

I

At the very beginning of the first hearing of his complaint for legal malpractice petitioner asked the

respondent court to protect his legal rights because he is a layman and no attorney would take his case. The respondent court told him that he could not find an attorney because he had no cause. Petitioner claims that this finding by the respondent court is a prejudgment of his case and a denial of his Constitutional right of due process of law under the Fourteenth Amendment for the reasons stated in the courts below; and it is not in accord with the holding of this Court in *Truax v. Corrigan,* 237 U.S. 312, 332 that

> "the due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon enquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society".

II

On July 8, 1966 the respondent court overruled the demurrer of the real parties in interest with twenty days allowed to them to answer. They failed to answer. On August 1, 1966 petitioner requested entry of default. On August 2, 1966 the respondent court granted them time to answer up to and including August 8, 1966. They filed their answer, a general denial consisting of three sentences, on August 9, 1966. On August 15, 1966 petitioner filed a second request for entry of default.

Section 586 of the California Code of Civil Procedure provides in pertinent part:

> "(Other defaults.) In the following cases the same proceedings must be had, and judgment must be rendered in the same manner, as if the defendant had failed to answer: . . .
>
> 2. If the demurrer to the complaint is overruled . . . , and the defendant fails to answer the complaint within the time allowed by the court;"

a default may be taken.

The term "proceedings" is explained in California Procedure, Witkin, volume 2, page 1694 as follows:

> "Procedure.
>
> (1) Request to Clerk. C.C.P. 585(1) provides for the entry 'upon application of the plaintiff,' and subdivision 2 merely states that the clerk 'must enter' the default. The 'application' is a simple notification or request to the clerk which sets out the facts requiring the entry. (See Owens, pp. 337, 338; 6 Hillyer 5524; cf. Fed. Rule 55(a); 3 B. & H. 44; 5 B. & H. 506.)"

The real parties in interest did not oppose petitioner's motion for entry of default. They did not appear at the hearing on this motion on August 16, 1966. The respondent court, of its own motion denied the request for entry of default, saying,

> "I will not do it because if I did I would set it aside." "You want me to enter a default because they were one day late? By that I would have to strike their answer, and I will not do it. I shall tell you why." "If I entered the default they would come right back and move to set it aside on the grounds of excusable neglect, or inadvertence or neglect,"

the respondent court explained. (Transcript of hearing on August 16, 1966, page 3, lines 5 and 6; lines 20-23; lines 7-9.)

Section 1054 of the Code of Civil Procedure permits the judge of the court to extend the time for filing pleadings; "but such extension so allowed shall not exceed thirty (30) days, without the consent of the adverse party".

August 8, 1966 was the last day of the thirty days extension which the respondent court could grant the real parties in interest for answering petitioner's complaint. They filed their answer consisting of three sentences on August 9, 1966. By denying, of its own motion, petitioner's requests for entry of default the respondent court acted contrary to the mandatory provisions of sections 586(2), 585(1)(2) and 1054 of the Code of Civil Procedure, thus arresting the time for answering and making the quoted laws ineffective.

Section 473 of the Code of Civil Procedure permits the Court to grant a party relief from entry of default or judgment taken if he applies for such relief upon the grounds of mistake, inadvertence, surprise or excusable neglect, within six months after such judgment, order or proceeding was taken. The real parties in interest had twice failed to answer within the time allowed; they did not oppose petitioner's motion for entry of their default; they did not appear at the hearing on this motion; and they did not ask to be relieved of their default. Therefore, section 473 does not apply to their two defaults, contrary to the

holding by the respondent court, as the following decision points out:

> [1] "Judgments—Opening and Vacating—Excusable Neglect.—The condition or situation which Code Civ. Proc. § 473 seeks to remedy is one in which a party to a cause is unexpectedly placed to his injury without any fault or negligence of his own which ordinary prudence could not have guarded against, but only such inadvertence or negligence as may reasonably be characterized as excusable warrants relief. . . .
>
> [4] Judgments—Opening and Vacating—Inexcusable Neglect.—It is not the purpose of Code Civ. Proc. § 473, to permit the setting aside of judgments that are the result of inexcusable neglect of the parties, or their attorneys in the performance of their obligations to their clients." *Hummel v. Hummel,* 161 CA 2d 272-273.

The reasons which the respondent court gave for denying petitioner's request for entry of default are proof that the respondent court had full knowledge and understanding of the mandatory provisions of the above quoted laws, but nevertheless, upon its own motion and contrary to their mandatory provisions, denied petitioner's requests for entry of default and thus acted in favor of the real parties in interest and with purposeful, discriminatory hostility against petitioner because he is a layman who did not engage the services of an attorney, even though he had explained several times to the respondent court that no attorney would take his action for legal malpractice. However, when petitioner moved for entry of default,

he was in the same position and had the same rights as any other plaintiff in the State moving for entry of default. The denial of his request for entry of default is therefore an unlawful administration of sections 586(2) and 585(1)(2) of the California Code of Civil Procedure, a denial of his Constitutional right of the equal protection of the laws guaranteed by the Fourteenth Amendment, and the order of the court below denying his request for entry of default is not in accord with the following holdings of this Court:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibitions of the Constitution." *Yick Wo v. Hopkins, Sheriff,* 118 U.S. 356, 373-374.

> "It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all actions of the State denying equal protection of the laws whether it be action of one of these agencies or by another." *Virginia v. Rives,* 100 U.S. 313, 318.

III

Petitioner claimed that the respondent court denied his Constitutional rights of due process of law and of the equal protection of the laws, both guaranteed by the Fourteenth Amendment. This Court said in *Zucht*

v. King, 260 U.S. 174, 177 that such "averments do present a substantial constitutional question" and in the following decisions that this Court will review them if effectively claimed in the courts below.

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." *Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.,* 312 U.S. 287, 293.
>
> "Denial of equal rights in the action of the judicial tribunals of the State are left to the revisory power of this Court." *Virginia v. Rives,* 100 U.S. 313, 322.
>
> "This Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; . . ." *Fiske v. Kansas,* 274 U.S. 380.
>
> "The due process of law clause in the Fourteenth Amendment . . ." requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'." *Herbert et al. v. Louisiana,* 272 U.S. 312-313.
>
> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler,* 263 U.S. 22, 24.

> In *Neal v. Delaware,* 103 U.S. 370 this Court held the exclusion, because of their race and color, of citizens from jury service by the jury commissioners, if made without authority derived from the Constitution and laws of the State, a violation of the prisoner's rights, under the Constitution and laws of the United States, which the trial court was bound to redress; "and the remedy for any failure in that respect is ultimately in this court upon writ of error."

The denial of petitioner's petition for a hearing by the court below and thus affirming the denial of petitioner's request for entry of default by the trial court is a denial of petitioner's claimed Constitutional rights, and it is not in accord with the above quoted decisions of this Court, in which this Court affirmed these rights and stated that this Court will review their denial "in the action of the judicial tribunals of the State". *Virginia v. Rives,* 100 U.S. 313, 322.

Petitioner respectfully submits that the special and important reasons for the exercise of this Court's discretionary jurisdiction for review of his petition on writ of certiorari, stated in Rule 19 of the Rules of this Court, are given and that this Court may reverse the decree of the Supreme Court of the State of California and remit the case with instructions to reverse the denial of petitioner's request for entry of default by the respondent Superior Court of the City and County of San Francisco.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
January 12, 1967.

GERHARD BRASCH,
Petitioner in propria persona.

(Appendix Follows)